In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 220

BENJAMIN H. FULLER and JOHN J. BERNICH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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Subject Index

Table of Authorities Cited

Cases

S.

T.

U.

V.

W.

Texts and Statutes Pages

Appendix

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PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray for a writ of certiorari to review the final judgment of the Circuit Court of Appeals for the Ninth Circuit entered on June 11, 1940, affirming the judgment of conviction against petitioners by the United States District Court in and

for the Southern Division of the Northern District of California.

The petitioners were indicted on thirteen counts. The first twelve counts charged petitioners with knowingly and willfully falsifying, concealing and covering up by a trick, scheme and device, to-wit: by false affidavits, and using and causing to be used said false affidavits, for the purpose of *selling* gold to the United States Mint at San Francisco, California, all in violation of Title 18 U. S. C. A., Sec. 80 thereof, and also in count thirteen with a conspiracy by means of said false affidavits to *sell* gold and defraud the United States in violation of Title 18, U. S. C. A., Sec. 88 thereof. (Indictment, Tr. 1-43.)

They were tried and convicted (Tr. 110, 542), except as to count one of the indictment, as to which the trial Court directed the jury to find a verdict of not guilty. (Tr. 490-491, 541.) This left twelve counts for the consideration of the jury. Counts two and three charge petitioner Fuller with the substantive offenses of making *but two* false affidavits in *selling* gold to the United States Mint at San Francisco and copies of these two alleged false affidavits are appended to the indictment and made a part thereof, count two being Exhibit "B" (Tr. 28-31) and count three being Exhibit "C". (Tr. 31-34.)

Counts four, five and six charge petitioner Bernich with the substantive offenses of making *but three* affidavits in *selling* gold to the United States Mint at San Francisco and copies of these three alleged false affidavits are appended to the indictment and made a part

thereof, count four being Exhibit "D" (Tr. 34-37), count five being Exhibit "E" (Tr. 37-40) and count six being Exhibit "F". (Tr. 40, 43.)

Counts seven, eight and nine charge petitioner Fuller with using and causing to be used the said false affidavits above referred to in *selling* gold to the United States Mint. (Indictment, Tr. 15-18.)

Counts ten, eleven and twelve charge petitioner Bernich with using and causing to be used the false affidavits above referred to in counts four, five, and six in *selling* gold to the United States Mint. (Indictment, Tr. 18-21.)

Count thirteen charged a *general conspiracy* to *sell* gold to the United States Mint against all the defendants, six in number. (Tr. 21-22.)

Petitioners were each sentenced to a period of five years on the eleven counts of the indictment in violation of Title 18 U. S. C. A., Sec. 80, all of said sentences to run concurrently, and to two years on the conspiracy charge in violation of Title 18 U. S. C. A., Sec. 88, that sentence also to run concurrently with the other sentences. (Tr. 548-549.)

It should be explained that all of the other four defendants who were acquitted, as well as the two petitioners, are miners and engaged in the mining and milling of ores and converting the same into gold bullion in Amador County within the *Northern* Division of the Northern District of California.

The "Gold Reserve Act of 1934" and the regulations promulgated by the Secretary of the Treasury there-

under require that any *sale* of gold bullion to the United States Mint shall be accompanied by an affidavit. (See Sec. 38 of Provisional Regulations issued under the Gold Reserve Act of 1934; see appendix to this petition.) The affidavits five in number—set out in the various counts of the indictment were on Form "TG-19" and had to accompany the *sale* of gold to the Mint "by persons who have *mined or panned* it."

The petitioners prosecuted an appeal to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of conviction. (See opinion of Appellate Court in appendix to this petition.)

The petitioners presented to the trial Court a demurrer to the indictment which was overruled, exception taken and the ruling of the trial Court affirmed on the appeal.

They likewise presented motions for a directed verdict, which were likewise denied by the trial Court, exception taken and the ruling of the trial Court affirmed on appeal.

They also presented a plea in abatement and motion for change of venue supported by affidavits as to the first twelve counts of the indictment (not including the count thirteen as to conspiracy), which plea and motion were likewise denied, exception taken and the ruling of the trial Court affirmed on appeal.

They also made a timely motion for a bill of particulars, which was also denied by the trial Court and likewise affirmed on appeal.

Various serious and flagrant errors were committed by the trial Court in its rulings admitting and reject-

ing evidence, to all of which exceptions were taken, but the rulings of the trial Court were affirmed on appeal.

Misconduct of the prosecuting attorney in his remarks to the jury, which were deeply prejudicial to the petitioners, was also assigned as error, but the rulings of the trial Court in this respect were affirmed on appeal.

These petitioners presented no evidence in their behalf but relied entirely upon the insufficiency of the case presented by the prosecution. Of the six defendants indicted, the trial Court was compelled to instruct the jury to acquit as to two because of the weakness of the evidence introduced by the prosecution; two of the other defendants were acquitted by the jury; thus leaving the two petitioners who now petition for a writ of certiorari.

Although the record is somewhat voluminous (see Transcript of Record, Vols. I and II), the trial consuming some three weeks and involving the testimony of some thirty witnesses introduced by the prosecution, the opinion of the Circuit Court of Appeals is exceedingly brief and either ignores or fails to comment on the several important constitutional and jurisdictional questions pressed to its attention, both on the arguments in chief and on petition for rehearing, and now presented to this Honorable Court for its serious consideration.

In support of this petition for writ of certiorari, the following important questions are presented for the consideration of this Honorable Court.

I.

GOLD RESERVE ACT OF 1934 DOES NOT PROHIBIT "A SALE". IT SIMPLY PROHIBITS "ACQUIRING".

The demurrer interposed to the indictment should have been sustained on some one, or all, of the grounds urged and presented. (Tr. 54-63; 147.)

> *"Where the charge is of crime, it must have clear legislative basis."*
>
> *United States v. George,* 228 U. S. 14, *22.*

A reading of Secs. 3 and 4 of the Gold Reserve Act will disclose that it is *not* an offense to *sell gold* to the United States Mint, or, in fact, to anyone. What is inhibited is:

> "Any gold *withheld, acquired, transported, melted or treated, imported, exported or earmarked, or held in custody,* in violation of this act or *of any regulation issued hereunder, or licenses issued pursuant thereto."* (See Appendix to this petition, pp. vi-vii.)

In other words, *"acquiring"* of gold contrary to the Act is prohibited but the *"sale"* of gold *is not prohibited.* A mere reading of the Gold Reserve Act will establish that. Therefore, this entire prosecution, which is based on the *sale of gold* to the United States Mint, falls to the ground and the petitioners stand convicted of offenses which are not such in fact.

The situation is comparable to that which existed under the National Prohibition Act. Under that Act, the *purchaser* was not criminally liable but the *seller*

was. Under the Gold Reserve Act the *seller* is *not liable* but the *purchaser,* the person *acquiring—buying* —the gold is criminally liable.

> "The purchaser of liquor is not criminally liable, as the National Prohibition Law is against the sale of liquor and not the purchase. Likewise, a person who assists a purchaser is not liable."
>
> *McFadden on Prohibition,* Sec. 267, p. 294;
> *Harkins v. Provenzo,* 189 N. Y. S. 258;
> *Lindsay v. State* (Ark.), 219 S. W. 1025;
> *Cortinas v. State* (Texas), 245 S. W. 911;
> *Harris v. State* (Ark.), 215 S. W. 620.
>
> "Seeking now to apply the rule to this case, it is notable that the substantive offense is selling; *buying is not a crime.* That there cannot be a seller without a correlative buyer is true, but not to the point. Congress has taken half a transaction and labeled that as crime; *the other half is not condemned."*
>
> *Vannata v. United States,* 289 Fed. 424, *428.*

Nor could a conspiracy be alleged between buyer and seller. As was well said by Mr. Justice Stone in *United States v. Katz,* 271 ~~Fed~~ U.S. 354, 70 L. Ed. 986, *988:*

> "This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity. Compare United

States v. New York C. & H. R. R. Co. (C. C.), 146 Fed. 298; United States v. Dietrich (C. C.), 126 Fed. 664; Vannata v. United States (C. C. A. 2d), 289 Fed. 424, 427."

The same would be true of the "Gold Reserve Act of 1934". A conspiracy between the buyer to "acquire" gold and the seller to "sell" gold could not be charged as a crime, "as the agreement of the parties was an essential element in the sale."

The demurrer to the indictment generally and specifically urged that not any of the counts of the indictment set forth facts sufficient to constitute any offense against the laws of the United States. (Demurrer, Tr. pp. 54-62; 147.)

The regulations prescribed by the Secretary of the Treasury under the Gold Reserve Act, to-wit: "Article VI. Purchase of gold by Mints", apply to "purchase" not *"sale"* and any regulation prescribed by the Secretary of the Treasury requiring an affidavit on form TG-19 to accompany *"the sale"* of gold to the United States Mint is not justified by any law of Congress and has no *"clear legislative basis"*. The petitioners had a perfect legal right *to sell* gold to the Mint or to anyone else.

See, also,

United States v. Eaton, 144 U. S. 677, 688, 36 L. Ed. 591, *594;*

United States v. George, 228 U. S. 14.

II.

GOLD RESERVE ACT OF 1934 IS UNCONSTITUTIONAL, AND THE RULES AND REGULATIONS PRESCRIBED BY THE SECRETARY OF THE TREASURY UNDER SUB. (c) OF SEC. 3 OF THE ACT ARE VOID.

(a) The Gold Reserve Act of 1934 is unconstitutional. It is contrary to Sub. 5 of Sec. 8 of Article I of the Constitution of the United States which provides:

> "The Congress shall have power * * * to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." (Tr. 54-76; *60-61-62;* 147.)

This is a country of delegated powers. The States reserved all powers to themselves excepting those expressly or impliedly delegated to the Federal Government. There is nothing in the Constitution authorizing the Federal Government to buy all of the gold produced within the several States; in fact, giving the Federal Government a monopoly on all the gold produced within the several States and, in effect, violative of the anti-trust laws.

But certainly it is a denial of due process of law, when the Congress or the Secretary of the Treasury attempts to enact regulations making it a violation of law for a citizen of California to own a gold nugget, or to acquire a gold nugget, or to transport a gold nugget, or to sell a gold nugget, or to hoard a gold nugget, any more than a gold chain or a gold watch.

(b) The rules and regulations of the Secretary of the Treasury are unconstitutional and void.

Section 3 of the Gold Reserve Act of 1934 provides:

> "Sec. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balance; and, (c) *for such other purposes as in his judgment are not inconsistent with the purposes of this Act.*" (See Appendix, p. vi.)

We are concerned with the regulations of the Secretary of the Treasury under the head of "(c)". These regulations consist of numerous provisions, entitled "Article VI. Purchase of Gold by Mints", especially from Sections 35 to 42 of the regulations. (See provisional Regulations issued under the Gold Reserve Act of 1934.)

But Congress, under Sub. (c) does not state for what purpose, or in fact, any purpose, the Secretary of the Treasury is to issue any regulations under the head of (c). It affords no standard or basis for any regulations to be issued by him. It simply leaves the entire matter to his own unbounded, unlimited and unfettered judgment without any legislative instructions or standards set up by Congress. It must be manifest that there is no congressional basis for any of the regulations issued by the Secretary of the Treasury upon which to base the forfeiture of the

gold in question. Congress simply abdicated its legislative function to the Secretary of the Treasury.

No sufficient, or any, standard is set up by Congress to effect a lawful delegation of its legislative powers to an executive officer by Sec. 3, Sub. (c) of Sec. 442 of the Gold Reserve Act of 1934.

It is, of course, a fundamental constitutional principle that the legislature cannot delegate legislative power to an executive official or department.

In its aforementioned recent applications of said basic legal principle, the Supreme Court has very definitely condemned various attempts by Congress to vest in the executive branches of our government, unfettered discretion to make and adopt policies which are essentially legislative and not administrative.

The following are but a few of the many decisions of the United States Supreme Court on this subject:

Schechter Poultry Corp. v. U. S. (1934), 295 U. S. 495, 79 L. ed. 1570;

Panama Refining Company v. Ryan (1934), 293 U. S. 388, 79 L. ed. 446;

Carter v. Carter Coal Co. (1935), 298 U. S. 238, 80 L. ed. 1160;

Wayman v. Southard (1825), 10 Wheat. 1, 6 L. ed. 253.

See, also:

St. Louis Terminal R. Co. v. U. S. (1911—C. C. A. 8), 188 Fed. 191;

U. S. v. Mathews (1906—D. C.), 146 Fed. 306.

But, more on this subject will be presented in the brief supporting this petition.

The Circuit Court of Appeals held that the Gold Reserve Act of 1934 *"does not purport to provide punishment as and for a criminal offense."* (110 F. (2d) 815, *817.*) If the *sale* of gold is not prohibited, then every count of the indictment falls for each count thereof is predicated upon the *sale* of gold to the United States Mint. (Tr. 143.)

The conclusion is inescapable that there is no legal justification for the offenses charged and that the conviction of the petitioners is null and void and should be set aside.

III.

"GOLD RESERVE ACT OF 1934" IS A SPECIAL STATUTE ON THE SUBJECT OF GOLD, GOLD BULLION, ETC. AND SUPERSEDES AND IS AN EXCEPTION TO THE FALSE CLAIMS ACT AS CONTAINED IN SEC. 80 OF TITLE 18 U. S. C. A.

Petitioners' demurrer should have been sustained on that ground alone. (Tr. 54-62, *59, 60, 61;* 147.)

It was contended, both in the trial Court and before the Circuit Court of Appeals, that the false claims act, Sec. 80, Title 18 U. S. C. A., was inapplicable to the offenses charged; that it had, in effect, been superseded by the "Gold Reserve Act of 1934", which was a special statute, alone applicable to the offenses charged;

and for the further reason that the later provisions of the "Gold Reserve Act of 1934" are inconsistent with and repugnant to the penal provisions of Sec. 80, Title 18 U. S. C. A.

A reading of the complete text of the "Gold Reserve Act of 1934" with the "Provisional Regulations issued under the Gold Reserve Act of 1934", will show how completely and exclusively the "Gold Reserve Act of 1934" and its regulations cover and legislate as to gold, gold bullion etc. and how its milder punishment for violations of the act and the regulations, of forfeiture of the gold and a penalty in twice the value of the gold, are entirely inconsistent and repugnant to the drastic punishment of ten years imprisonment and/or a fine not to exceed $10,000 imposed by the false claims act, Section 80, Title 18 U. S. C. A., under which latter statute the petitioners were prosecuted and convicted. (See 48 Stats. 337-344.)

The Circuit Court of Appeals, however, held to the contrary, stating:

> "It is urged that the Gold Reserve Act provides an exclusive penalty for the violation of its terms, thus superseding the false claims statute. By Section 4 of the act provision is made for the forfeiture of gold held in violation of the law, and for a 'penalty equal to twice the value of the gold.' *The section does not purport to provide punishment as for a criminal offense.* In any event it is immaterial whether it does or not, for the section obviously deals with an offense entirely distinct from that punishable under the false claims statute." (Italics ours.)

We contend, as we contended in the Court below, that the "Gold Reserve Act of 1934" supersedes and is an exception to the false claims act and the Congress clearly indicated that the milder punishment imposed by the "Gold Reserve Act of 1934" should be exclusive and not resort had to the drastic punishment imposed by the false claims act.

IV.

PROSECUTION EVEN UNDER FALSE CLAIMS ACT CANNOT BE SUSTAINED.

The indictment under the false claims act both for the substantive offenses and the conspiracy charges a false affidavit. (See 80, Title 18 U.S.C.A. and see 88, Title 18 U.S.C.A.) This affidavit is provided for by Sub. 3 of Sec. 442 of the Gold Reserve Act. As the Circuit Court of Appeals said in its opinion:

> "Paragraph 38 of the regulations requires that 'an affidavit in form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning * * *' *The regulation does not particularize the information to be included in the affidavit.*" (See opinion in Appendix, p. iii.)

If the regulation does not provide for the particular information, how can any crime or offense be based thereon?

> *"Where the charge is of crime, it must have clear legislative basis."*
>
> *U. S. v. George,* 228 U. S. 14.

The "trick, scheme and device" set forth in every count of the indictment, in *selling* gold to the United States Mint, is a "false affidavit" on "form TG-19". The affidavit on "form TG-19" is prescribed by the regulations of the Secretary of the Treasury under the "Gold Reserve Act of 1934". None of the matters set out in each count of the indictment are required to be set out in an affidavit on "form TG-19". In other words, an affidavit on "form TG-19" is not required, by the regulations, to set out

> "together with a statement also under oath giving (a) the names of the persons from whom gold was purchased; (b) amount and description of each lot of gold purchased; (c) the location of the mine or placer deposit from which each lot was taken; and (d) the period within which such gold was taken from the mine or placer deposit, shall be filed with each such delivery of gold by persons who have purchased such gold directly from the persons who have mined or panned such gold." (See Appendix, p. v.)

The particulars above set forth are required by regulation to be set forth on "form TG-21". But the indictment in the case at bar deals *only with an affidavit on "form TG-19"*. All that this affidavit on "form TG-19" requires, so far as the regulations provide is that *"If delivered to the mint by persons who have mined or panned it, an affidavit on Form 'TG-19' is to be filed"*.

But no regulation of the Secretary of the Treasury provides for the particulars which must be set out on "form TG-19", in order to constitute falsity or per-

jury. *There is absolutely no "clear" or, in fact, any "legislative basis" for the crime charged in the indictment.*

It is conceded by the Circuit Court of Appeals, in its opinion, that "the regulation does not particularize the information to be included in the affidavit." (See opinion in Appendix, p. iii.)

But, before an act can become a crime in this country, it *"must have clear legislative basis"*. The offenses charged in each count of the indictment in the case at bar have *no "clear legislative basis"*, and, having none, the entire prosecution must fail and the conviction of petitioners is rendered null and void.

It is indeed anomalous that one can be convicted for a felony when the special statute governing the entire subject, according to the decision of the Appellate Court, provides no criminal punishment at all. (See opinion in Appendix, pp. i-iv.)

Again, the indictment charges that the allegedly false affidavits were used "to defraud the United States". (Tr. 22.) The evidence discloses that the United States was not defrauded of a single cent. The United States Mint bought the gold and placed its own valuation on it. It is one thing to defraud the United States out of money or something of value. It is quite another thing to interfere with the functions of the government by means of false affidavits. The indictment does not charge that any function of the government was interfered with by the use of the five false affidavits set out in the indictment and the pleader is concluded by his own allegation. (Tr. 1-43.)

Crime in this country cannot be supported on a "fiction of law". We submit that where it is no offense to *sell* gold to the United States Mint, any regulation of the Secretary of the Treasury prescribing an affidavit with reference thereto *making it an offense is null and void* and, if that be so, that any prosecution under the false claims act based on any alleged false affidavit is equally without legal foundation and void.

The Circuit Court of Appeals holds in effect that the Gold Reserve Act does not create any offenses or crimes and yet it holds that under the false claims act the petitioners can be prosecuted for acts which are not in themselves criminal and for a conspiracy of acts which are not in themselves criminal, *and for which there is no clear legislative basis.*

V.

OFFENSES CHARGED IN FIRST SIX COUNTS OF INDICTMENT WERE COMMITTED AND SHOULD HAVE BEEN TRIED WITHIN NORTHERN DIVISION OF NORTHERN DISTRICT OF CALIFORNIA.

How the Circuit Court of Appeals could uphold the ruling of the lower Court in deciding that the lower Court had jurisdiction of the charges contained in the first six counts of the indictment when the affidavits attached to the first six counts of the indictment, to-wit: Exhibits "A", "B", "C", "D", "E", "F", showed that the affidavits were all signed, sworn to

and executed in Jackson, Amador County, within the *Northern* Division of the Northern District of California and therefore constitutionally and properly triable at Sacramento within the *Northern* Division of the Northern District of California and not at San Francisco within the *Southern* Division of the Northern District of California is, frankly, incomprehensible to us. We made timely motions supported by sworn affidavits both by way of plea in abatement and motion for change of venue to change the place of trial as to those counts. (Tr. 25-43; 45-50; 50-53.)

The reason given by the Appellate Court that "however, the offenses had their culmination in the Southern Division, hence were triable there", is certainly no answer to the plea in abatement and motion for change of venue as to the first six counts of the indictment, for, confessedly, they were *all sworn to in Jackson, Amador County,* which is within the *Northern* Division of the Northern District of California and hence triable at Sacramento, California. (See opinion in Appendix, p. iii.)

Certainly, as to the first six counts of the indictment, the petitioners were entitled, as a matter of constitutional right, to be tried in the *Northern* Division of the Northern District of California and not in the *Southern* Division and, *on this ground alone,* this petition for certiorari should be granted. Neither the action of the trial Court nor of the Circuit Court of Appeals, in denying the plea in abatement and motion for change of venue, can be justified on any ground whatsoever.

VI.

BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED.

The only reason given for the affirmance of these motions by the Appellate Court is: "The offenses charged are described with great particularity in the indictment." (See opinion in Appendix, p. iii.)

It must be evident that the 200 or more affidavits of a total stranger to the case—one George F. Fuller, —which were subsequently produced at the trial and of which the petitioners had no notice, were *not described with any particularity in the indictment or, indeed, at all.*

The petitioners were called to the bar of justice to answer *six affidavits.* (Tr. 1-43.) They were not called upon to meet some 200 or more affidavits of an utter stranger to the case, by whose affidavits they were not bound and could not be held responsible, and who was never proven to be a co-conspirator with the petitioners or anyone else.

Under all the elementary rules of criminal law which protect a person accused of crime, the bill of particulars should have been granted, especially under the decision of the Circuit Court of Appeals for the Ninth Circuit, rendered in the case of *Schreve v. United States,* 77 F. (2d) 2, *9.*

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, *593.*

The motion for a bill of particulars should have been granted by the trial Court. Some 200 or more

affidavits were introduced in evidence as to which the petitioners were not advised and were taken by gross surprise and against which they were wholly defenseless. Most of these affidavits related to one not a defendant in the case and by which the petitioners could not be bound. The promise of the prosecution to connect this stranger to the case as a fellow conspirator or "unknown defendant" was never kept. There was no evidence of the slightest tinge of conspiracy between this "unknown defendant", and the petitioners or either of them as to whom some 200 affidavits were introduced against the petitioners, to their great prejudice and harm before the jury. The jury was led to believe that the petitioners were responsible for or had something to do with these 200 or more affidavits of an utter stranger to the case.

VII.

ADMISSION OF 200 OR MORE AFFIDAVITS ABOVE REFERRED TO GROSS, INEXCUSABLE AND PREJUDICIAL ERROR.

We submit that respondent's attempt to excuse the denial of the motion for a bill of particulars or the admission in evidence of the 200 or more affidavits of George Franklin Fuller, Sr.,—a total stranger to the case—is insufficient and does not answer the vice of the admission of this large highly prejudicial batch of affidavits in the case.

Most of these outside or extraneous affidavits were massed in "U. S. Exhibit 8". (Tr. 248; 252; 253-4;

271-272; 273-274-275; 276-277; 278-279; 487-488.) These affidavits related for the most part—some 200 in number—to the mining operations of George Franklin Fuller, Sr., a total stranger to the case—during 1936 and 1937; some forty additional affidavits were introduced against petitioner Bernich and some twenty additional affidavits against petitioner Fuller. *The falsity of not a single one of these affidavits was established by direct or circumstantial evidence.* Their introduction in evidence could have no other result than to confuse and confound the jury. The obvious purpose of the prosecution in introducing this evidence was, of course, that of attempting to still further prejudice the defense in the eyes of the jury by showing that the petitioners had made very substantial sums out of this gold business, the implication being that these were illicit gains. This "evidence" was one of the aforementioned flimsy bits of evidence by which the prosecution attempted to build up the "atmosphere", and create the impression in the minds of the jury, that it was dealing with "big shot" gold racketeers.

Furthermore, what materiality or relevancy the admission of 30 or more affidavits by petitioner Bernich as to his operations in the Fern Mine could have on the falsity of the three affidavits in the indictment is difficult to imagine, which three affidavits were confined to the Fuller Mine.

VIII.

MISCONDUCT OF ASSISTANT PROSECUTING ATTORNEY SHOULD RESULT IN A NEW TRIAL.

The counsel for the government, in his brief before the Circuit Court of Appeals, made no attempt whatever to uphold or defend against the inexcusable remarks made that *"it would be cumbersome to file an indictment containing 200 such affidavits"*, referring to affidavits of a total stranger to the case, George Franklin Fuller, Sr. The only justification given at the trial was that "it also goes to show the conspiracy and means of completing the conspiracy." (Tr. 246-247-248; 271-272; 276-277; 166-176.)

But the prosecution presented no evidence whatsoever of any conspiracy between the petitioners and George Franklin Fuller, Sr., or any other "unknown individual", although it promised repeatedly to do so. (Tr. 179-180-181-182.)

These inexcusable and indefensible remarks, that *"it would be cumbersome to file an indictment containing 200 such affidavits"*, could have had no other effect than to lead the jury to believe that the prosecution could have presented an indictment containing 200 or more additional charges against the petitioners,—most damaging, prejudicial and incurable misconduct.

Berger v. United States, 295 U. S. 78, 79 L. Ed. 1314, *1319-1322*.

IX.

EVIDENCE TOTALLY INSUFFICIENT TO JUSTIFY CONVICTION ON EITHER SUBSTANTIVE OFFENSES OR CONSPIRACY CHARGE.

The motions for an instructed verdict should have been granted by the trial Court and the Appellate Court should have reversed the judgment of conviction for the refusal of the trial Court to grant the motions for an instructed verdict. (Tr. 488-516; 516-518; 147-149.)

There was not the slightest direct testimony as to the falsity of any of the five affidavits charged in the indictment, assuming, which we deny, that the regulations providing for such affidavits are constitutional and valid. There was nothing in the case on the part of the prosecution but surmise, conjecture, opinion, probabilities, inference on an inference and presumption on presumption, evidence entirely insufficient in a criminal case to uphold a conviction.

United States v. Ross, 92 U. S. 281, 23 L. Ed. 707, *708;*

Gerson v. United States, 25 F. (2d) 49, *60;*

People v. Van Zile, 143 N. Y. 372, 38 N. E. 381;

Body v. Glucklich, 116 Fed. 131, 53 (C. C. A.) 451.

Even if the inferences or presumptions could be dignified as circumstantial evidence, the conviction could not be sustained, for it is well settled that, where the testimony and evidence, based on circumstantial

evidence, is just as consistent with the innocence of the petitioners as with their guilt, the duty of the trial Court is to instruct the jury to acquit.

Hayes v. United States, 169 Fed. 101, *103;*
Mickel v. United States, 157 Fed. 229;
Van Gorder v. United States, 21 F. (2d) 939, *942;*
Turinetti v. United States, 2 F. (2d) 15, *17.*

In upholding the ruling of the trial Court and of the Circuit Court of Appeals in denying the motions for a directed verdict, the Circuit Court of Appeals stated: "*Appellants did not take the stand* and no evidence was introduced in their defense." (See opinion in Appendix, p. iv.)

We respectfully submit that the Circuit Court of Appeals was doing violence to one of the most elementary principles of criminal law and that is, that one accused of crime does not have to take the stand and no inference or presumption of guilt can be indulged against him on that account. A defendant is presumed to be innocent and proof of his guilt must be established beyond all reasonable doubt. The burden of proof is on the prosecution and *not* on the defendant.

Articles V and VI of Amendments to Constitution;
Act of Congress of March 15, 1878 (20 Stat. at L. 30, Chap. 37);
Boyd v. United States, 116 U. S. 616;
Coffin v. United States, 156 U. S. 432, *455,* 39 L. Ed. 481, *491.*

As was well said by Mr. Justice White in the great case of *Coffin v. United States,* 156 U. S. 432, *455,* 39 L. Ed. 481, *491:*

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and *its enforcement lies at the foundation of the administration of our criminal law.* * * *"

We respectfully submit that the Circuit Court of Appeals had no more right to indulge in "any presumption against him (defendant)" from his failure to take the stand (Act March 16, 1878, c. 37, 20 Stat. 30), than had the jury or trial Court, under this mandatory statute and the law of the land.

We sincerely believe that we come within some of the requirements of Sub. 5 of Rule 38 of the Rules of the Supreme Court of the United States, which indicate when petitions for writs of certiorari will be granted. For instance, we believe we come within (b) of Sub. 5 of Rule 38, which states:

> "(b) Where a circuit court of appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions; *or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings,*

or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (Italics ours.)

The constitutionality of the "Gold Reserve Act of 1934" has not been passed upon by this Honorable Court; the validity of the regulations under that Act as contained in Sub. (c) of Section 3 of the "Gold Reserve Act of 1934" and whether they constitute unlawful delegation of legislative power to an executive has never been passed upon by this Honorable Court; whether the "Gold Reserve Act of 1934" is a special statute on the subject of gold, gold bullion etc. and supersedes or constitutes an exception to the false claims act, Title 18 U. S. C. A., Sec. 80, has never been passed upon by this Honorable Court; in other respects, we submit that the rulings of the trial Court resulting in the conviction of the petitioners were so erroneous as to deprive them of a fair and impartial trial and the refusal of the Circuit Court of Appeals for the Ninth Circuit to reverse their conviction constitutes, we respectfully submit, a travesty on justice.

Wherefore, because of the gravity and importance of the questions involved your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them, and each of them, to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the records and proceedings with the original exhibits of the said Circuit Court of Appeals in the case

lately pending therein, entitled Benjamin H. Fuller and John J. Bernich, Appellants, vs. United States of America, Appellee, No. 9221, to the end that the decision and judgment of said Circuit Court of Appeals for the Ninth Circuit may be reviewed as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the decision and judgment of said Circuit Court of Appeals for the Ninth Circuit and of the United States District Court in and for the Southern Division of the Northern District of California in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners now present, as an exhibit to this petition, a certified copy of the entire transcript of record before the Circuit Court of Appeals for the Ninth Circuit, with the original exhibits therein, to which Court they pray the writ of certiorari may be directed.

Dated, San Francisco, California,
June 28, 1940.

MARSHALL B. WOODWORTH,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioners in the above-entitled cause and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition for a writ of certiorari is not interposed for delay.

Dated, San Francisco, California,
June 28, 1940.

MARSHALL B. WOODWORTH,
Attorney for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

BENJAMIN H. FULLER and JOHN J. BERNICH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

While we believe we have sufficiently stressed the principal points, constitutional, jurisdictional and otherwise, in the petition for certiorari, still we append, in this very short brief, additional views and authorities in support of the petition.

I.

GOLD RESERVE ACT OF 1934 DOES NOT PROHIBIT "A SALE". IT SIMPLY PROHIBITS "ACQUIRING".

Every count of the indictment is based on a *sale* of gold to the United States Mint. (Tr. 1-43.)

The regulations prescribed by the Secretary of the Treasury under the Gold Reserve Act, to-wit: "Article VI. Purchase of Gold by Mints", apply to *"purchase"* not *"sale"* and any regulation prescribed by the Secretary of the Treasury requiring an affidavit on form TG-19 to accompany *"the sale"* of gold to the United States Mint is not justified by any law of Congress and has no *"clear legislative basis."* The petitioners had a perfect legal right to *sell* gold to the Mint or to anyone else.

The Circuit Court of Appeals for the Ninth Circuit, in this very case, held that the "Gold Reserve Act of 1934" *"does not purport to provide punishment as for a criminal offense."*

Fuller et al. v. United States, 110 F. (2d) 815, *817.*

Therefore, if it be no criminal offense to violate the "Gold Reserve Act of 1934", and the *sale* of gold is not inhibited by the Act, then a violation of any regulation prescribed by the Secretary of the Treasury under the "Gold Reserve Act of 1934" is equally without "clear legislative basis" as and for a criminal offense.

United States v. George, 228 U. S. 14, *22.*

As was well said by the Supreme Court in *United States v. Eaton*, 144 U. S. 677, *688*, 36 L. Ed. 591, *594*:

> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of the law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a *criminal offense* in a citizen, where a statute does *not distinctly make the neglect in question a criminal offense.*"

That case and the case of *United States v. George*, 228 U. S. 14, *should be decisive of the case at bar.* It was there held that while the Secretary of the Interior and Land Department had administrative power to make rules and regulations they had no *legislative* power to create offenses which Congress did not itself legislate upon. Said the Supreme Court:

> "In United States v. United Verde Copper Co., supra, this court considered the power of the Secretary of the Interior under an act of Congress giving the right to cut timber from the public lands for certain purposes, which were enumerated 'or domestic purposes', and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe 'for the protection of the timber and of the undergrowth growing on such lands, *and for other purposes'*. (Italics ours.) The Secretary made a regulation which provided, among other things, that no timber should be 'permitted to be used for smelt-

ing purposes, smelting being a separate and distinct industry from that of mining'. The justification urged for the regulations was that the word 'domestic' meant household. This court rejected the contention and decided that the regulation transcended the power of the Secretary. We said, 'If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. *If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'*

In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. *The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis.* In illustration we may cite Williamson v. United States, 207 U. S. 425; United States v. Keitel, 211 U. S. 370; United States v. Eaton, 144 U. S. 677; Morrill v. Jones, 106 U. S. 466; United States v. Biggs, 211 U. S. 507; Dwyer v. United States, 170 Fed. Rep. 160." (Italics ours.)

II.

GOLD RESERVE ACT OF 1934 IS UNCONSTITUTIONAL, AND THE RULES AND REGULATIONS PRESCRIBED BY THE SECRETARY OF THE TREASURY UNDER SUB. (c) OF SEC. 3 OF THE ACT ARE VOID.

While we think that we have sufficiently presented this matter in the petition, it may not be amiss to refer to a few of the authorities on the subject, to the effect that any regulations under Sub. (c) of Sec. 3 of the "Gold Reserve Act of 1934" (see also Sec. 442, 31 U. S. C. A.) are null and void as being legislative functions delegated to an executive.

In the case of *Uebersee Finanz Korporation, etc. v. Rosen* (1936) (C. C. A. 2nd), 83 F. (2d) 225, Cert. Denied 56 S. Ct. 946, in which the Court was called upon to pass upon the constitutionality of Subs. (a) and (b) of Sec. 3 of the Gold Reserve Act, clearly, in its decision, indicates that Sub. (c) quoted above, was an unlawful delegation of power, viz.:

> "If subdivision (c) 31 U. S. C. A. sec. 442 (c), which enabled the Secretary also to except gold 'for such other purposes as in his judgment are not inconsistent with the purposes of this Act', involves a delegation so broad as to be invalid, the remainder of the Act is separable and is saved from criticism because of any invalidity of subdivision (c), for the reason that section 16 (31 U. S. C. A. sec. 445) which we have quoted, so provides."

As was well said in the case of *United States v. George*, 228 U. S. 14, *22:*

> "We said 'If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. *If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'* * * *"
>
> "In other words, a distinction between the legislative and administrative function was recognized and enforced in the case at bar. *The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis."* (Citing cases.) (Italics ours.)

How apposite is that language to the regulations issued by the Secretary of the Treasury under Subdivision (c), 31 U. S. C. A., Sec. 442. (Sec. 3 of "Gold Reserve Act of 1934", 48 Stat. 340.)

In the *Panama Refining Company* case, 293 U. S. 388, 79 L. Ed. 446, the Supreme Court, in holding the "hot oil" provisions of the N. I. R. A. to be an unlawful delegation of legislative power to the President, ruled that no proper or sufficient standards were provided in the Act to control or limit the executive discretion, viz.:

> "It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in Sec. 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to deter-

mine the policy and to lay it down, as he may see fit." (293 U. S. at 415.) * * *

"So, also, from the beginning of the Government, the Congress has conferred upon executive officers the power to make regulations—'not for the government of their departments, but for administering the laws which did govern'. United States v. Grimaud, 220 U. S. 506, 517, 55 L. ed. 563, 567, 31 S. Ct. 480. Such regulations become, indeed, binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined." (293 U. S. at 428.)

* * * * * * *

"We see no escape from the conclusion that the Executive Orders of July 11, 1933, and July 14, 1933, and the Regulations issued by the Secretary of the Interior thereunder are without constitutional authority." (293 U. S. at 433.)

In the *Schechter* case, 295 U. S. 495, 79 L. Ed. 1570, the Supreme Court, in its unanimous decision condemning the N. R. A. as an unlawful delegation of legislative power, clearly indicated the indispensability of proper standards to control the administrative discretion, viz.:

"It (i. e., the Statute) does not undertake to prescribe rules of conduct to be applied to particular state of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of the codes to prescribe them. For that legislative undertaking, sec. 3 sets up no standards aside from the statement of the general aims of rehabilita-

tion, correction and expansion described in sec. 1. In view of the scope of that broad declaration, and of the nature of the few restrictions imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code making authority thus conferred is an unconstitutional delegation of legislative power." (295 U. S. at 541.)

Other authorities to the same effect are:

U. S. v. Maid, 116 Fed. 650;

U. S. v. Eaton, 144 U. S. 677.

If violations of the "Gold Reserve Act of 1934" or of its regulations can be prosecuted under the false claims act, Sec. 80 of Title 18 U. S. C. A. and, for conspiracy, under Sec. 88, Title 18 U. S. C. A., then it follows that there must be some *"clear legislative basis"* for the crime charged.

The only basis for an accusation under the false claims act is allegedly a false affidavit. This affidavit is provided for by the Gold Reserve Act or, to speak more accurately, by one of the regulations of the Gold Reserve Act. This affidavit forms the basis and lies at the foundation of every count of the indictment. The one directly involved in the case at bar is Sec. 38 of "Article VI. Purchase of Gold by Mints" of Provisional Regulations issued under the Gold Reserve Act of 1934. It provides that:

"An affidavit on form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the

United States or any place subject to the jurisdiction thereof."

Confessedly, if the affidavit under Sub. 3 of Sec. 442 of the Gold Reserve Act constitutes an illegal delegation of legislative power to an executive, or if the particulars of the affidavit are not provided or prescribed, then the foundation or basis for each count of the indictment falls, because *"where the charge is of crime, it must have clear legislative basis"*.

U. S. v. George, 228 U. S. 14, *22*.

A reading of Secs. 3 and 4 of the Gold Reserve Act will disclose that it is *not* an offense to *sell gold* to the United States Mint. What is inhibited is:

"Any gold *withheld, acquired, transported, melted or treated, imported, exported or earmarked, or held in custody,* in violation of this act or of any regulation issued hereunder, or licenses issued pursuant thereto."

(See 48 Stats. 337-344.)

There is not a word said about the "sale" of gold to the United States Mint nor is that prohibited nor is it made an offense and any regulations under Sub. (c) of Sec. 442 of the Gold Reserve Act inhibiting the "sale" of gold must necessarily be illegal and void.

Every count of the indictment is predicated upon the *sale of gold* to the United States Mint. (Tr. 1-43.)

The conclusion is inescapable that there is no legal justification for the offenses charged and that the conviction even under the false claims act is null and void.

III.

"GOLD RESERVE ACT OF 1934" IS A SPECIAL STATUTE ON THE SUBJECT OF GOLD, GOLD BULLION, ETC. AND SUPERSEDES AND IS AN EXCEPTION TO THE FALSE CLAIMS ACT AS CONTAINED IN SEC. 80 OF TITLE 18 U. S. C. A.

It is not claimed by the prosecution, in the case at bar, that the petitioners defrauded or cheated the United States Mint at San Francisco of a single cent. The mint received every ounce of gold that it was supposed to receive and lost nothing in any of the transactions. Nor, by the wildest stretch of the imagination, was any government function in any way interfered with, nor is there any allegation in any count of the indictment that any Government function was interfered with. Title 18, U. S. C. A., Sec. 80, is a general statute applicable to the presentation of false claims against the United States, whether by trick, scheme or device, whereas, the "Gold Reserve Act of 1934" is a *special* statute limited to transactions involving gold, gold bullion etc., and violations thereof.

That a later special statute applicable to a special class of offenses supersedes and controls over a former and earlier general statute is, of course, elementary. The "Gold Reserve Act of 1934" is a later statute and relates to and is limited to a special subject, to-wit: gold, gold bullion etc. and violations thereof.

> *"It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict*

with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

59 *C. J.* 1056-58 and many cases there collated.

While the offenses charged in the indictment in the case at bar may be within the letter of Title 18 U. S. C. A., Sec. 80 thereof, they certainly are not within the spirit of that law. But whether they are or not, the "Gold Reserve Act of 1934" is a much later act and is a *special act* and constitutes an *exception* to the class of offenses denounced by the former general law as contained in Title 18 U. S. C. A., Sec. 80 thereof. Any violations of the "Gold Reserve Act" or of its many regulations must be prosecuted under that act and are punishable alone under that act.

A mere examination of the many provisions of the "Gold Reserve Act of 1934" will readily establish this. (For Act see 48 Stats. 337-344.)

Besides that, an examination of the "Provisional Regulations issued under the Gold Reserve Act of 1934", dated June 1, 1937, will disclose how carefully and minutely the Secretary of the Treasury with the approval of the President has promulgated some 46 rules and regulations comprehended under eight dif-

ferent articles. These "Provisional Regulations" are readily obtainable at the Treasury Department or from the Director of the Mint.

Further argument on this branch of the case would seem to be unnecessary. It is respectfully submitted that this prosecution, resulting in a conviction of the two petitioners (the acquittal of four others similarly charged) was brought under the *wrong statute*. It should have been brought, as the Congress intended, under the "Gold Reserve Act of 1934" for violation of its regulations issued by the Secretary of the Treasury. The indictment discloses, in every count thereof, that the defendants were all accused of a violation of the "Gold Reserve Act of 1934" and that a violation of one of its regulations, to-wit: Section 38, providing for certain forms of affidavit, is the basis and foundation of the accusation in every count.

Section 7 of the "Gold Reserve Act of 1934" provides: "All acts and parts of acts inconsistent with any of the provisions of this act are hereby repealed."

For authorities on the subject that a later and a special act supersedes a former general law, see:

U. S. v. Tynen, 11 Wall. 88, 20 L. Ed. 153, *154-155;*

U. S. v. Auffmordt, et al., 122 U. S. 197, 30 L. Ed. 1182-*1185;*

U. S. v. Wyndham, 264 Fed. 376, *377;*

Gorman v. Hammond, 28 Ga. 85;

Jackson v. Cravens, 238 Fed. 117, *120;*

Snitkin v. U. S., 265 Fed. 489.

It is respectfully submitted that both the trial Court and the Circuit Court of Appeals for the Ninth Circuit erred in not sustaining the demurrer to the indictment on this ground alone. (Tr. 54-63; 147.)

IV.

PROSECUTION EVEN UNDER FALSE CLAIMS ACT CANNOT BE SUSTAINED.

Crime, in this country, must have *clear legislative* basis.

U. S. v. George, 228 U. S. 14, *22;*

The Circuit Court of Appeals for the Ninth Circuit (see Appendix, p. iii), in its opinion, concedes that "The regulation does not particularize the information to be included in the affidavit".

The prosecuting attorney, who appeared before the Circuit Court of Appeals, also conceded that "The contents of the affidavit (form TG-19) are not set forth in the regulations".

This affidavit, form TG-19, as we have seen, is required by Sec. 38 of "Article VI. Purchase of Gold by Mints" of Provisional Regulations issued under the Gold Reserve Act of 1934. (See Appendix, pp. v-vi.)

But if the regulation does "not particularize the information to be included in the affidavit", what law, what statute, what regulation does?

We further submit that where the regulations do "not particularize the information to be included in the affidavit" the Circuit Court of Appeals, by judicial construction, cannot in effect legislate a regula-

tion for the Secretary of the Treasury. The regulation itself, assuming it to be constitutional and not an unlawful delegation of legislative power, must "particularize the information to be included in the affidavit". In the absence of any particularization on the subject there can be no prosecution for crime based on perjury or falsity, whether under the false claims act or any other act.

The Circuit Court of Appeals holds in effect that the Gold Reserve Act does not create any offenses or crimes and yet it holds that under the false claims act the petitioners can be prosecuted for acts which are not in themselves criminal and for a conspiracy of acts which are not in themselves criminal, *and for which there is no clear legislative basis.*

We have ventured the statement once before that offenses and crimes cannot be evolved out of a "fiction of law".

There is *no clear legislative basis* for affidavit on "Form TG-19" (which permeates the entire indictment). The particulars of the affidavit are not set forth or prescribed or provided for by the Secretary of the Treasury, conceding, which we do not admit, that the Secretary of the Treasury under Sub. (c) of Sec. 3 of the Gold Reserve Act of 1934 had the slightest power to make any regulation providing for affidavit on "Form TG-19" or any other affidavit.

We may be pardoned if we make reference "as to how certain tyrants put their laws on pillars so high that plain citizens could not mark, learn, and inwardly digest the same".

See *Vannata v. United States,* 289 Fed. 424, *429.*

V.

OFFENSES CHARGED IN FIRST SIX COUNTS OF INDICTMENT WERE COMMITTED AND SHOULD HAVE BEEN TRIED WITHIN NORTHERN DIVISION OF NORTHERN DISTRICT OF CALIFORNIA.

As stated in the Petition for Certiorari these offenses were committed in the *Northern Division* of the Northern District of California but were tried, over the protest and objections of the petitioners, within the *Southern Division* of the Northern District of California, although timely plea in abatement and motion for change of venue based on sworn affidavits were made.

We have fully presented this point in the Petition and contend that the action of the trial Court and of the Circuit Court of Appeals, in denying petitioners the right to be tried in the place where these particular offenses were committed, were clearly erroneous and indefensible.

VI.

BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED.

We believe we have sufficiently set forth in the Petition for Certiorari the grounds and reasons why the trial Court and the Circuit Court of Appeals erred in denying the motion for a bill of particulars under the circumstances disclosed by the record in this particular case.

VII.

ADMISSION OF 200 OR MORE AFFIDAVITS ABOVE REFERRED TO GROSS, INEXCUSABLE AND PREJUDICIAL ERROR.

We believe that a mere statement of this gross, inexcusable error on the part of the trial Court and of the Circuit Court of Appeals is sufficient of itself, under the facts disclosed by the record, to justify the granting of the petition for writ of certiorari.

Under all the elementary rules of criminal law which protect a person accused of crime, the bill of particulars should have been granted and the 200 or more affidavits of a total stranger to the case excluded from the consideration of the jury.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, *593;*

Schreve v. United States, 77 F. (2d) 2, *9.*

VIII.

MISCONDUCT OF ASSISTANT PROSECUTING ATTORNEY SHOULD RESULT IN A NEW TRIAL.

As we have already pointed out in the Petition for Writ of Certiorari, and which we again assert without fear of contradiction, the prosecution presented no evidence whatsoever of any conspiracy between the petitioners and George Franklin Fuller, Sr., a total stranger to the case or any other "unknown individual" although it promised repeatedly to do so. (Tr. 179-180-181-182.)

The inexcusable remarks made by the prosecuting attorney that "it would be cumbersome to file an indictment containing 200 such affidavits" undoubtedly led the jury to believe that the prosecution could have presented an indictment containing 200 or more charges against the petitioners.

Under the decision of the Supreme Court of the United States in *Berger v. United States,* 295 U. S. 78, 79 L. Ed. 1314, *1319-1322,* misconduct of a prosecuting attorney tantamount to that presented by the record in the case at bar was held to deprive the defendant of a fair and impartial trial and to justify a reversal.

Much that the Supreme Court, through Mr. Justice Sutherland, said in that case is applicable to the case at bar.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.
>
> It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming', a different conclusion might be reached. Compare Fitter v. United States (C. C. A. 2d) 258 F. 567, 573; Johnson v. United States (C. C. A. 7th) 215 F. 679, 685, L. R. A. 1915A, 862; People v. Malkin, 250 N. Y. 185, 201, 202, 164 N. E. 900; State v. Roscum, 119 Iowa 330, 333, 93 N. W. 295. *Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.* Compare New York C. R. Co. v. Johnson, 279 U. S. 310, 316-318, 73 L. ed. 706, 709, 710, 49 S. Ct. 300.

> The views we have expressed find support in many decisions, among which the following are good examples: People v. Malkin, 250 N. Y. 185, 164 N. E. 900, supra; People v. Esposito, 224 N. Y. 370, 375-377, 121 N. E. 344; Johnson v. United States (C. C. A. 7th) 215 F. 679, supra; Cook v. Com., 86 Ky. 663, 665-667; Gale v. People, 26 Mich. 157; People v. Wells, 100 Cal. 459, 34 P. 1078. The case last cited is especially apposite.
>
> Judgment reversed."

This decision is peculiarly applicable to the case at bar. The misconduct of the prosecuting attorney was glaring, persistent and continued. (See instances set out in assignments of error Nos. XXI, XXII, XXIII, Tr. 159-164; XXVI, XXVII, XXVIII, Tr. 166-176.) The prosecuting attorney insisted that *"it would be cumbersome to file an indictment containing 200 such affidavits"*. He, time and again, sought to justify the introduction of all of these extraneous affidavits on the ground that *"it also goes to show the conspiracy and means of completing this conspiracy"*. And yet, no conspiracy was ever proven between the person, George Franklin Fuller, Sr., whose 200 or more affidavits were introduced in evidence over objection and exception, and the two petitioners, or either of them, or anyone else. The jury was undoubtedly impressed with the fact that the two petitioners had something to do with these 200 or more affidavits executed by George Franklin Fuller, Sr., without the slightest bit of evidence to justify such an inference or impression, save and except the statement of the prosecuting attorney that *"it would be cumbersome to file an indictment containing 200 such affidavits"*.

Furthermore, this decision is applicable in that the case against Berger was not strong, which is the fact in the case at bar. There was absolutely not the slightest *direct* evidence that the six affidavits charged against petitioners were false. There was nothing in the case against the petitioners except surmises, conjectures, inference on an inference or presumption based on another presumption which evidence is condemned by the Supreme Court of the United States in such cases as *United States v. Ross,* 92 U. S. 281, 23 L. Ed. 707, *708,* and other decisions of the Federal Courts as being totally insufficient to sustain a conviction. The circumstances of guilt urged by the prosecuting attorney were equally consistent with those of innocence and on that ground alone the jury should and would have acquitted the petitioners but for the misconduct of the prosecuting attorney and the introduction in evidence of the 200 or more affidavits of a total stranger to the case and other serious errors committed by the trial Court.

Hayes v. United States, 169 Fed. 101, *103;*
Mickel v. United States, 157 Fed. 229;
Wright v. United States, 227 Fed. 855, *857;*
Van Gorder v. United States, 21 F. (2d) 939, *942;*
Turinetti v. United States, 2 F. (2d) 15, *17.*

The case was so weak that the trial Court was compelled to direct the jury to instruct to acquit against two of the defendants and the jury acquitted two other defendants out of the six then on trial.

It is respectfully submitted that, based on this flagrant misconduct of the prosecuting officer that "*it*

would be cumbersome to file an indictment containing 200 such affidavits" implying and practically telling the jury that the prosecution had 200 more charges against the petitioners, serious and prejudicial error was committed depriving the petitioners of a fair and impartial trial which should result in a reversal and granting of a new trial.

IX.

EVIDENCE TOTALLY INSUFFICIENT TO JUSTIFY CONVICTION ON EITHER SUBSTANTIVE OFFENSES OR CONSPIRACY CHARGE.

We believe that we have fully presented this point in the Petition for Certiorari and that further argument or citation of authority would not strengthen our plea in this respect.

We, however, remind this Honorable Court of the onerous burden cast upon the petitioners when the Court of Appeals took the view that "appellants did not take the stand". (See opinion in Appendix to this Petition, p. iv.)

It was the constitutional right of the petitioners not to take the stand and to remain silent and no inference of guilt could be indulged in by the trial jury, or the trial Court or, we respectfully submit, by the Circuit Court of Appeals, because the petitioners did not take the stand and relied upon the insufficiency of the evidence presented by the prosecution.

We again remind this Honorable Court that the Circuit Court of Appeals for the Ninth Circuit did

not give petitioners the benefit of their views as to the constitutional questions presented to them, nor as to the unlawful delegation of legislative power to an executive officer under the "Gold Reserve Act of 1934" and its regulations, but ignored these important matters, which were strongly and vigorously called to its attention on the original argument, both orally and by briefs, and upon the rehearing.

Without further prolonging this short brief, we respectfully submit that the petition for the writ of certiorari should be granted and for such other and further relief as to this Honorable Court may seem proper and just.

Dated, San Francisco, California,
June 28, 1940.

Respectfully submitted,
MARSHALL B. WOODWORTH,
Attorney for Petitioner.

(Appendix Follows.)

Appendix

In the United States Circuit Court of Appeals for the Ninth Circuit

Benjamin H. Fuller and John J. Bernich, Appellants, vs. United States of America, Appellee.	No. 9221 Mar. 27, 1940

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Before: Garrecht, Haney and Healy, Circuit Judges.

Healy, Circuit Judge.

Appellants were convicted of violations of the statute relating to the presentation of false claims, 18 USCA §80, and of conspiracy to commit an offense against the United States, 18 USCA §88.

The indictment charges in six of its counts that appellants and four others (who were acquitted) wilfully falsified material facts in a matter within the jurisdiction of an agency of the United States. The falsification occurred in connection with the sale of quantities of gold to the mint at San Francisco. Under regulations issued by the Secretary of the Treasury pursuant to the Gold Reserve Act of 1934, 31 USCA

§§440 et seq., the mints were authorized to purchase gold from persons who had mined or panned it, on the condition that the gold be accompanied by an affidavit on a form called TG-19.[1] It was charged that in the affidavits which accompanied the tenders false information was given the mint concerning the source of the gold and the time of its production. Also that appellants falsely stated that it had been mined by themselves. There were six counts relating to as many falsifications and six relating to the use made of the affidavits. Appellants were convicted on all counts except the first, and were sentenced to serve five years on each count, the sentences to run concurrently.

It is urged that the Gold Reserve Act provides an exclusive penalty for the violation of its terms, thus superseding the false claims statute. By §4 of the act provision is made for the forfeiture of gold held in violation of the law, and for a "penalty equal to twice the value of the gold." The section does not purport to provide punishment as for a criminal offense. In any event it is immaterial whether it does or not, for the section obviously deals with an offense entirely distinct from that punishable under the false claims statute.

The indictment is attacked on the ground that the regulations do not require a statement of the various facts alleged to have been falsified in the affidavits. Paragraph 38 of the regulations requires that "an affidavit in form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold

1. For a discussion of the various forms of affidavit required by the regulations, see Hills v. United States, 9 Cir., 97 F. (2d) 710, 711-712.

by mining or panning . . ." The regulation does not particularize the information to be included in the affidavit. But form TG-19 in fact requires a statement of all the matters which the indictment charged to be false.

It is claimed that the court erred in refusing to grant appellants' motion for a change of venue from the southern to the northern division of the northern district of California. 28 USCA §114. It is said that all the offenses, except that of conspiracy, were committed in the northern division, for the reason that all of the affidavits were executed there and were presented, with the gold, to a bank in Amador County for transmission to the mint. However, the offenses had their culmination in the southern division, hence were triable there. All of the affidavits were addressed to the Superintendent of the Mint at San Francisco and all were acted upon at San Francisco. Counts 1 to 6 properly alleged that the defendants falsified the facts at San Francisco; and counts 7 to 12 with equal propriety alleged that the affidavits were used and caused to be used by appellants at that place.

Appellants moved for a bill of particulars, but there was no error in the denial of the motion. The offenses charged are described with great particularity in the indictment. The precise facts alleged to have been falsified are set out in the indictment and the affidavits themselves are incorporated in the various counts.

The evidence was sufficient to warrant the conviction of both appellants. There was proof of circumstances from which the jury might properly infer

that the gold was not in fact produced at the mine stated and that appellants themselves did not mine it. Appellants did not take the stand and no evidence was introduced in their defense.

These are the principal matters complained of. Other errors were assigned but we find none requiring a reversal.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 27, 1940. Paul P. O'Brien, Clerk.

"SEC. 38. Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof.—(1) The mints shall not purchase any gold under clause (a) of section 35 unless the deposit of such gold is accompanied by a properly executed affidavit as follows:

An affidavit on form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the United States or any place subject to the jurisdiction thereof: *Provided, however,* That such persons delivering gold in the form of nuggets or dust having an aggregate weight of not more than 5 ounces, which they have recovered from mining or panning in the United States or any place subject to the jurisdiction thereof, may accompany such delivery with full and complete information on form TG-19 without the requirement of an oath.

An affidavit on form TG-20 shall be filed with each delivery of gold by persons who have recovered such gold from gold-bearing materials in the regular course of their business of operating a custom mill, smelter, or refinery.

An affidavit on form TG-21 together with a statement also under oath giving (a) the names of the persons from whom gold was purchased; (b) amount and description of each lot of gold purchased; (c) the location of the mine or placer deposit from which each lot was taken; and (d) the period within which such gold was taken from the mine or placer deposit, shall be filed with each such delivery of gold by persons who have purchased such gold directly from the persons who have mined or panned such gold.

In addition such persons shall show that the gold was acquired, held, melted and treated, and transported by them in accordance with a license issued pursuant to section 23 hereof, or that such acquisition, holding, melting and treating, and transportation is permitted under article II without necessity of holding a license."

(See "Provisional Regulations Issued under Gold Reserve Act of 1934" on June 1, 1937, p. 18.)

"SEC. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) *for such other purposes as in his judgment are not inconsistent with the purposes of this Act.* Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in the Philippine Islands or other places beyond the limits of the continental United States.

SEC. 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited

to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred."

(48 Stats. 337, 340, 344.)

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 220

BENJAMIN H. FULLER and JOHN J. BERNICH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI, HERETOFORE FILED, to the United States Circuit Court of Appeals for the Ninth Circuit.

Fearing that we have not sufficiently stressed certain points in the Petition for Writ of Certiorari heretofore filed, we, with the permission of this Honorable Court, file this Supplement to Petition for Writ of Certiorari.

A.

HOLDING OF CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT, THAT "GOLD RESERVE ACT OF 1934" "DOES NOT PURPORT TO PROVIDE PUNISHMENT AS FOR A CRIMINAL OFFENSE" (SEE OPINION IN APPENDIX TO PETITION, p. ii), IS SQUARELY OPPOSED TO THE DECISION OF THIS COURT RENDERED IN UNITED STATES v. REISINGER, 128 U. S. 398-402, 32 L. ED. 480.

Said the Circuit Court of Appeals for the Ninth Circuit, in its opinion:

> "It is urged that the Gold Reserve Act provides an exclusive penalty for the violation of its terms, thus superseding the false claims statute. By Sec. 4 of the act provision is made for the *forfeiture* of gold held in violation of the law, and for a '*penalty* equal to twice the value of the gold.' *The section does not purport to provide punishment as for a criminal offense.*" (Italics ours.) (See Opinion in Appendix to Petition for Writ of Certiorari, p. ii.)

The words *"forfeiture", "penalty",* were construed by the United States Supreme Court, in *United States v. Reisinger,* 128 U. S. 398-402, 32 L. Ed. 480, *481-482,* as applicable to and comprehending "criminal offenses".

Said this Court, through Mr. Justice Lamar:

> "The only ground upon which the correctness of this interpretation may be doubted is, that the words 'penalty', 'liability' and 'forfeiture' do not apply to crimes and the punishments therefor, such as we are now considering. *We cannot assent*

to this. These words have been used by the great masters of Crown Law and the elementary writers as synonymous with the word punishment, in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that 'branch of jurisprudence which teaches of the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty.' Alluding to the importance of this department of legal science, he says: 'The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered.' Referring to the unwise policy of inflicting capital punishment for certain comparatively slight offenses, he speaks of them as 'these outrageous penalties', and repeatedly refers to laws that inflict the 'penalty of death'. He refers to other Acts prescribing certain punishments for treason as 'Acts of pains and penalties'.

That the Legislature intended that this 13th section should apply to all offenses is shown by Sec. 5598, R. S. under the title of 'Repealed Provisions', which is as follows:

'All offenses committed and all *penalties* or *forfeitures* incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made.'

It was the obvious intention of Sec. 13, R. S., to extend this provision to the repeal of any statute not embraced in such revision.

The views we have expressed find support in the case of the United States v. Ulrici, 3 Dill. 532,

which was an indictment for conspiring to de
fraud the Government of internal revenue taxes
It became necessary there to determine the mean
ing of the words 'penalty', 'forfeiture', 'liability'
and 'prosecution', in Sec. 13 of the Revised Stat
utes. The court, speaking by Mr. Justice Miller
said:

'But, without attempting to go into a precise
technical definition of each of these words, it is my
opinion that they were used by Congress to in-
clude all forms of punishment for crime; and as
strong evidence of this view, I found, during the
progress of the argument, and called the attention
of the counsel to a section, which prescribed fine
and imprisonment for two years, wherein Con-
gress used the words: "Shall be liable to a pen-
alty of not less than one thousand dollars * * * and
to imprisonment not more than two years." More-
over, any man using common language might say,
and very properly, that Congress had subjected a
party to a liability, and, if asked what liability,
might reply, a liability to be imprisoned. This is
a very general use of language, *and surely it
would not be understood as denoting a civil pro-
ceeding.* I think, therefore, that this word "lia-
bility" is intended to cover every form of punish-
ment to which a man subjects himself, by violat-
ing the common laws of the country. Besides, as
my brother Treat reminds me, the word prosecu-
tion is used in this section, and that usually de-
notes a criminal proceeding.' " (Italics ours.)

Under all of the text books and authorities, forfei-
ture and penalties are punishment for criminal acts.

"In the municipal law of England and the United States the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws."

Vol. 22 *Am. & Eng. Ency. Law* (2d Ed.), p. 654, and cases there cited.

"A forfeiture, so far as the present inquiry is concerned, is a loss of one's rights and interests in his property. It is deemed proper to treat of forfeitures in this article, because they are all included within the generic meaning of the term *'penalty'*"

Vol. 13 *Am. & Eng. Ency. Law* (2d Ed.), p. 54, and cases cited.

"The power to provide for fines, *forfeitures*, and *penalties* resides primarily in the various legislatures, which may punish for violations of whatever laws they have power to enact.

The governing bodies of the various political subdivisions of the states have no such power in the absence of a clear and distinct legislative delegation thereof, and when the power is delegated it can be exercised only within the strict limits of the grant.

A *penalty* must be expressly created and imposed by statute, and cannot be raised by implication."

Vol. 13 *Am. & Eng. Ency. Law* (2d Ed.), p. 55, and authorities.

The "Gold Reserve Act of 1934" providing for forfeiture of improperly held gold, is *highly penal* and hence government must show *intent* to violate the act.

U. S. v. 98 $20 Gold Coins, D. C. Pa. 1937, 20 F. Supp. 354.

We respectfully submit that the decision of the Circuit Court of Appeals for the Ninth Circuit on that point in the case at bar cannot be sustained and is in direct conflict with the decision of the United States Supreme Court in the case of *United States v. Reisinger,* supra.

B.

DECISION OF CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN CASE AT BAR IS CONTRARY TO DECISION OF U. S. DISTRICT COURT FOR EASTERN DISTRICT OF TEXAS.

In the case of *United States v. J. W. Gilliland et al.,* the United States District Court for the Eastern District of Texas sustained a demurrer to an indictment charging substantive offenses under the False Claims Act similar to those involved in the case at bar.

This case is now on appeal before this Honorable Court (see No. 245, October Term, 1940), having been brought here by the prosecution under the statutory jurisdiction to review by direct appeal the judgment complained of under Title 18 USCA, Sec. 682, otherwise known as "Criminal Appeals Act", and by Title 28 USCA, Sec. 345.

We thus have a conflict between the lower Federal Courts on the same subject.

The opinion in the case of *United States v. J. W. Gilliland et al.,* does not appear to have been as yet reported in the Federal Reporter but it is so illuminating and well reasoned that we refer to the full text thereof published and filed in this Court in the case of *United States v. Gilliland et al.,* No. 245, October Term 1940, in "Statement to Jurisdiction", at pages 7 to 34, inclusive.

Both cases involved the making of affidavits and using and causing to be used affidavits allegedly in violation of the False Claims Act.

In sustaining a demurrer to the indictment the learned District Judge (Hon. Benjamin C. Dawkins, of the Federal bench in the State of Louisiana), holding that the offenses alleged in violation of the False Claims Act should have been prosecuted under the special act, to-wit: the Connally Hot Oil Act, of February 22, 1935, just as, in the case at bar, the prosecution should have been had under the special act, to-wit: "Gold Reserve Act of 1934", instead of the False Claims Act, said:

> "Of course, where there is ambiguity or uncertainty, such reports may be resorted to in construing a statute, particularly to save it from unconstitutionality, but they cannot serve to overturn well-established principles of interpretation. *Granting that the Interior Department desired and thought it could make the harsh penalties of this section of the Criminal Code applicable to its*

administration of the Connally Act, that purpose could not be accomplished except by the use of proper legislative methods. While it is true that everyone is presumed to know the law, still it must be in such form that a reasonable person reading it can understand what is denounced and the penalty to be expected. Can it be fairly said that anyone, examining the provisions of both the Connally Act and Section 80 (a), would understand that, in addition to the comparatively light penalties imposed by the former for its violation, if he made a false affidavit or report with respect to matters covered by its provisions, he could be imprisoned for ten years and fined $10,000; whereas, if he transported a million barrels of hot oil in interstate commerce, without making such affidavit or report, he could be imprisoned not more than six months or fined not more than $2,000? In other words, that a single step of this particular nature would subject him to punishment twenty times as great as the completed act which the law was intended to prevent? It would seem that before such an astounding conclusion is reached, the purpose of Congress to make it possible should be clearly established. Under the well-known doctrine of ejusdem generis, general or omnibus clauses, such as 'in any matters within the jurisdiction of any department or agency', would mean matters of a similar or kindred nature to those dealt with in the explicit provisions of the law, in this instance, such as claims against, rights to or controversies about funds or property involved in 'operations of the Government.' To hold with the prosecution in this case, would be to say that Congress intended to create a multitude

of crimes with respect to operations of the innumerable and ever-growing departments, bureaus, and agencies of the Government by the simple means of amending in general terms a statute which had always been understood to apply to matters in which the Government was financially interested." (Italics ours.)

C.

FALSE CLAIMS ACT CANNOT SUPPORT INDICTMENT OR CONVICTION FOR MAKING AND/OR USING AND CAUSING TO BE USED ALLEGEDLY FALSE AFFIDAVITS BECAUSE U. S. MINT WAS NOT DEFRAUDED OF A SINGLE CENT NOR GOVERNMENTAL FUNCTION INTERFERED WITH IN SLIGHTEST DEGREE.

The indictment in the case at bar, drawn under the False Claims Act, charged and the conviction was obtained on the ground that the U. S. Mint was defrauded. (See Indictment, Tr. 22.)

The Solicitor-General, in his "Brief for the United States in Opposition" to our Petition for Writ of Certiorari, states in a footnote on pages 10-11:

> "It is several times stated by the petition (Pet. 16; Br. 38) that the United States did not lose by the transactions with them. It is well settled that under that portion of the conspiracy statute dealing with conspiracies to defraud the United States, allegation and proof of a pecuniary loss to the Government is not required." (Citing

> *Hammerschmidt v. United States,* 265 U. S. 182, 187; *Haas v. Henkel,* 216 U. S. 462, 479.) * * * "but the District Court for the Eastern District of Texas has ruled to the contrary in United States v. Gilliland (unreported) now pending on appeal to this Court (No. 245, present Term), It is not believed, however, that the granting of a writ of certiorari is required in the instant case because of this conflict. So far as the record indicates, the point was not *urged or decided* in the court below and it appears that petitioners' reference to a lack of pecuniary loss by the Government was intended to be only a *passing comment.*" (Italics ours.)

We hasten to correct this erroneous impression on the part of the Solicitor-General, that we were indulging in a mere *"passing comment"*.

Not only did we *urge* vigorously and repeatedly, orally and in the briefs, the "lack of pecuniary loss by the Government" in the trial Court and in the Circuit Court of Appeals both at the original hearing and on petition for rehearing but that contention was *decided* against the petitioners both in the trial Court and in the Appellate Court although it is true that the Appellate Court makes no mention of this *important point* in the opinion rendered by it. (See Opinion printed in Appendix to Petition for Writ of Certiorari, i-iv; see Demurrer, Tr. 59-60, Assignment of Error No. IV, Tr. 147; see Motion Arrest Judgment, Tr. 116-117, Assignment of Error No. XII, Tr. 149-150; see Motions for Instructed Verdict, Tr. 515, Assignment of Error Nos. VIII, IX, X, Tr. 148-149.)

In fact, one of our chief reasons for this Petition for Writ of Certiorari is based on that ground and will be found strenuously *urged* as ground:

"IV. PROSECUTION EVEN UNDER FALSE CLAIMS ACT CANNOT BE SUSTAINED", on pages 14 to 17 of our Petition, referring especially to pages 16 and 17 thereof and to pages 38 and 41-42 of Brief in support of Petition for Writ of Certiorari.

Wherefore, because of the gravity and importance of the questions involved in the Petition for Writ of Certiorari and in this Supplement to the Petition your petitioners pray that the decision and judgment of said Circuit Court of Appeals for the Ninth Circuit in the case lately pending therein entitled Benjamin H. Fuller and John J. Bernich, Appellants v. United States of America, Appellee, No. 9221, may be reviewed as provided by law and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the decision and judgment of said Circuit Court of Appeals for the Ninth Circuit and of the United States District Court in and for the Southern Division of the Northern District of California in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners now present, as an exhibit to this petition, a certified copy of the entire transcript of record before the Circuit Court of Appeals for the Ninth Circuit, with the original exhibits therein, to

which Court they pray the writ of certiorari may be directed.

Dated, San Francisco, California,
September 6, 1940.

MARSHALL B. WOODWORTH,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioners in the above entitled cause and that in my judgment the foregoing Supplement to Petition for Writ of Certiorari is well founded in point of law as well as in fact and that said Supplement is not interposed for delay.

Dated, San Francisco, California,
September 6, 1940.

MARSHALL B. WOODWORTH,
Attorney for Petitioners.

No. 220

In the Supreme Court of the United States

OCTOBER TERM, 1940

BENJAMIN H. FULLER AND JOHN J. BERNICH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

252585—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 220

BENJAMIN H. FULLER AND JOHN J. BERNICH,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 562–565) is reported in 110 F. (2d) 815.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 27, 1940 (R. 565–566), and a petition for rehearing was denied June 11, 1940 (R. 566). The petition for a writ of certiorari was filed July 8, 1940. The jurisdiction of this Court may be invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the petitioners were improperly convicted of violating the false claims statute (Criminal Code, Sec. 35, as amended June 18, 1934).

2. Whether the offenses charged in the first six counts were properly tried in the Southern Division of the Northern District of California.

3. Whether the admission in evidence of certain affidavits not specifically referred to in the indictment was erroneous; whether, in view of the introduction of these affidavits, a bill of particulars should have been granted; and whether reversible error resulted because of a remark made by the prosecutor when some of the affidavits were introduced.

4. Whether there was sufficient evidence to warrant the submission to the jury of the offenses charged.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra,* pp. 18–22

STATEMENT

An indictment in thirteen counts was returned against the petitioners and four others in the District Court for the Northern District of California, Southern Division (R. 1–43). The first twelve

counts were based upon the false claims statute (Criminal Code, Sec. 35, as amended, Appendix, *infra,* p. 18). The first six counts charged that the defendants unlawfully, knowingly, and willfully falsified, concealed, and covered up by a trick, scheme, and device a material fact in a matter within the jurisdiction of a department and agency of the United States. The next six counts charged that the defendants used and caused to be used certain affidavits knowing the same to contain certain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department and agency of the United States. These twelve counts alleged, in effect, that under regulations promulgated by the Secretary of the Treasury on January 31, 1934, pursuant to the Gold Reserve Act of 1934,[1] the United States mints were authorized to purchase gold recovered from natural deposits in the United States, and which shall not have entered into monetary or industrial use, subject to the condition that where the gold was delivered by persons who had recovered such gold by mining or panning the delivery should be accompanied by a properly executed affidavit on Form TG–19; that those executing Form TG–19 are required to state therein, *inter alia,* the name and location of the mine or deposit from which the gold was recovered and the period within which the recovery took place; that on certain dates the

[1] See Appendix, *infra,* pp. 20–21.

defendants made six shipments of gold to the United States mint at San Francisco; and that, for the purpose of inducing the mint to purchase this gold, the defendants caused each shipment to be accompanied by an affidavit executed by a particular defendant which falsely stated that the gold was recovered from a certain mine during certain periods. It was also alleged that the affidavits falsely stated that the gold was mined by those who executed the affidavits.

The thirteenth count charged a conspiracy under Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) to defraud the United States by the commission of acts similar to those referred to in the preceding twelve counts. The presentation to the mint of the affidavits which were the subject of those counts was alleged as overt acts.

These affidavits are annexed to the indictment as Exhibits A through F (R. 25–43). The evidence with reference to them may be summarized as follows:

Petitioner Fuller executed the originals of Exhibits A, B, and C.[2] These affidavits were applications to the mint at San Francisco on Form TG–19 to purchase quantities of gold allegedly recovered by petitioner Fuller. He swore in these affidavits that the gold to which they relate was recovered by him from the Fuller mine, Amador County, California, during the period from Sep-

[2] These are included in U. S. Exhibit 8, which is on file with the Clerk of this Court.

tember 1, 1937, to October 15, 1937, and that he recovered this gold by mining or panning.

Petitioner Bernich executed the originals of Exhibits D, E, and F.[3] These affidavits alleged that the affiant himself recovered the gold described from the Fuller mine by mining or panning during the periods February 1 to February 12, 1936, April 25 to May 8, 1936, and January 7 to February 12, 1938.

Three employees of the San Francisco mint testified that they received the above affidavits; that the gold described therein was purchased by the mint and payment therefor made to the petitioners (R. 224–230).[4]

In support of the Government's position that neither of the petitioners was operating the Fuller mine during the periods specified in the affidavits, it introduced testimony that petitioner Fuller during the time when, according to his affidavits, he was obtaining the gold described therein, was employed as a watchman by the General Petroleum Company. According to the records of that firm, he worked for it in Berkeley, California, five days a week and eight hours a day from January 1937 to the time of the trial (R. 364–366). As to petitioner Bernich, Stephen Sanguinetti testified that Bernich worked with him at a mine known as the

[3] These are likewise included in U. S. Exhibit 8.

[4] See U. S. Exhibit 5, on file with the Clerk of this Court.

Fern mine from 1935 to May 1936 (R. 342–343). Bernich and Sanguinetti then leased another mine known as the Amador Queen in June 1936 and worked it until the owner cancelled the lease in April 1938 (R. 233–234, 339–344). Letters from Bernich to the owner (R. 236–238) indicate that Bernich was operating the mine during such period. Sanguinetti testified that while he and Bernich were operating the Fern and Amador Queen mines, Bernich worked five and a half days a week, about seven hours a day (R. 341–343). From January 1936 to April 1938 Sanguinetti worked constantly with Bernich and during this period he never saw the latter work in the Fuller mine (R. 299, 341–345, 347–348).

There was also testimony that the Fuller mine was not in operation during part of the time when, according to two of Bernich's affidavits, he was recovering gold therefrom. That mine adjoins the Amador Queen mine and is connected to it by a tunnel. Access to the Fuller mine could only be had by going through the Amador Queen mine (R. 263, 298, 302, 345). During January or February 1936, there was a cave-in in the connecting tunnel (R. 256–258, 260, 300–302). Two witnesses testified that from the time of the cave-in to June 1936 nobody was working in the Fuller mine and that Bernich did not work there during that period (R. 260–261, 299–300). Bernich told witness Burke that he did not work in mine but purchased gold

from miners (R. 281–282) and on various occasions exhibited to Burke quantities of gold which he said he had bought (R. 285–286).

The petitioners were acquitted under the first count and convicted under the remaining counts (R. 114, 542), and were sentenced to five years' imprisonment on each of counts 2 through 12 and to two years' imprisonment on the conspiracy count, the terms of imprisonment to run concurrently (R. 122–131, 548–549). Upon appeal, their convictions were unanimously affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 562–566).

ARGUMENT

I

The petitioners contend that they were improperly convicted under the false claims statute for a number of reasons.

(a) Relying upon the language of Sections 3 and 4 of the Gold Reserve Act, (Appendix, *infra*, pp. 18–19), petitioners apparently contend that there was no legislative basis for the prosecution since those sections relate to the acquiring of gold by private individuals and others rather than its sale to a United States mint. In consequence, they also apparently assert that there was no basis for the regulations of the Secretary of the Treasury governing the purchase by and sale to a mint of gold (Pet. 6–8; Br. 30–32). From this petitioners presumably conclude that the subject matter of the

252585—40——2

prosecution did not involve a matter within the jurisdiction of the Treasury Department, as required by the false-claims statute.

Sections 3 and 4 of the Gold Reserve Act undoubtedly do not cover the purchase by or sale to a United States mint of gold. But Section 8 of the Act, amending Section 3700 of the Revised Statutes (Appendix, *infra*, pp. 19–20), provides that "With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts, at home or abroad, with any direct obligations, coin or currency of the United States, authorized by law, or with any funds in the Treasury not otherwise appropriated, at such rates and upon such terms and conditions as he may deem most advantageous to the public interest; * * *." And Section 11 of the Act (Appendix, *infra*, p. 20) gives authority to the Secretary to issue, with the approval of the President, "such rules and regulations as the Secretary may deem necessary or proper to carry out the purposes of this Act." It was pursuant to these sections and not Section 3 of the Act that the Secretary issued the regulations governing the purchase of gold by mints and requiring certain affidavits to accompany the deposit of gold. Sections 35 and 38 of Article VI of the regulations, Appendix, infra, pp. 20–21.[5] Peti-

[5] Section 2 of Article I of the regulations (Appendix, *infra*, p. 20) defines their scope and specifically states that while Articles 2, 3, 4, and 5 of the regulations refer particularly to Section 3 of the Act, "articles 6 and 7 refer particularly to sections 8 and 9, respectively, thereof."

tioners' attack upon the regulations consequently falls, and the matter was within the jurisdiction of the Treasury Department.

(b) The contention of petitioners that the rules and regulations of the Secretary of the Treasury are unconstitutional (Pet. 10–12; Br. 33–37) is based upon the same misconception of the provisions of the Gold Reserve Act under which those regulations were promulgated. Certain general contentions with reference to the validity of the statute (Pet. 9) are clearly fallacious, but even though the statute were unconstitutional that would not prevent the prosecution of petitioners under the false claims statute. *United States* v. *Kapp*, 302 U. S. 214, 217–218; *Kay* v. *United States*, 303 U. S. 1, 6–7; *Hills* v. *United States*, 97 F. (2d) 710, 713 (C. C. A. 9th).[6]

(c) Petitioners contend that the false claims statute was superseded by the Gold Reserve Act because the latter statute relates specifically to the subject of gold (Pet. 12–14; Br. 38–41). But nothing in the Gold Reserve Act undertakes to penalize false claims. In any event, petitioners make specific reference only to Section 4 and, as we have

[6] The above points as to the constitutionality of the Gold Reserve Act and the validity of the regulations of the Secretary of the Treasury were, according to the petitioners' application for rehearing in the Circuit Court of Appeals (p. 2), first argued in that court in that petition.

indicated, the instant prosecution is not based on Section 4.

(d) Petitioners contend that there is nothing in Section 38 of the regulations which requires the information upon which their prosecution was based. This regulation (Appendix, *infra*, p. 21) provides, however, that every person recovering gold by mining or panning who seeks to sell such gold to a mint must file an affidavit on Form TG–19. The type of affidavit to be filed by such persons and the information to be included therein, when prescribed by the Secretary of the Treasury,[7] became a part of the regulations themselves. Certainly this affidavit clearly called for the information upon which the prosecution was based (see R. 25–43), and it cannot be said that the petitioners were not adequately advised in advance of their sale of the gold to the mint as to the information for which they would be held accountable.[8]

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[7] Section 5 of Article I of the regulations (Appendix, *infra*, p. 20) provides that "Every * * * affidavit * * * required to be made hereunder shall be made upon the appropriate form prescribed by the Secretary of the Treasury * * *."

[8] It is several times stated by the petitioners (Pet. 16; Br. 38) that the United States did not lose by the transactions with them. It is well settled that under that portion of the conspiracy statute dealing with conspiracies to defraud the United States, allegation and proof of a pecuniary loss to the Government is not required. *Hammerschmidt* v. *United States*, 265 U. S. 182, 187; *Haas* v. *Henkel*, 216 U. S. 462, 479. A similar holding was made with reference to the false claims statute by the Circuit Court of Appeals

II

Petitioners contend (Pet. 17–18; Br. 43) that the offenses charged in the first six counts were committed and should have been tried within the Northern Division of the Northern District of California,[9] since the affidavits therein referred to were all signed, sworn to, and executed in Jackson, Amador County, which is within that division. This contention is without merit. It is obvious that the Government was not deceived until the affidavits reached the mint at San Francisco in the Southern Division. It would seem, therefore, that the offenses were solely committed in that division. In any event, as the Circuit Court of Appeals said (R. 564) "the offenses had their culmination in the southern division," and hence could be tried in that division under the statute relating to continu-

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for the Second Circuit in the cases of *Goldsmith* v. *United States*, 108 F. (2d) 917, certiorari denied, 309 U. S., pt. 1, p. IX, rehearing denied, 309 U. S., pt. 3, p. XII; *United States* v. *Mellon*, 96 F. (2d) 462, certiorari denied, 304 U. S. 586, and *United States* v. *Presser*, 99 F. (2d) 819, 822, but the District Court for the Eastern District of Texas has ruled to the contrary in *United States* v. *Gilliland* (unreported) now pending on appeal to this Court (No. 245, present Term). It is not believed, however, that the granting of a writ of certiorari is required in the instant case because of this conflict. So far as the record indicates, the point was not urged or decided in the court below and it appears that petitioners' reference to a lack of pecuniary loss by the Government was intended to be only a passing comment.

[9] See Section 53 of the Judicial Code, Appendix, *infra*, pp. 21–22.

ing offenses (Judicial Code, Sec. 42, Appendix, *infra*, p. 21).

In any event, the petitioners do not here question the jurisdiction of the District Court for the Southern Division to try the offenses charged in counts 7 through 12, upon each of which the petitioners likewise received a concurrent five-year sentence. Thus, it would be immaterial even if the contention were sound as to the lack of jurisdiction in the District Court over the first six counts. *Brooks* v. *United States*, 267 U. S. 432, 441; *Claassen* v. *United States*, 142 U. S. 140, 146.

III

(a) Petitioners complain of the introduction of certain affidavits not specifically referred to in the indictment—some 200 or more by one George Franklin Fuller, Sr., and others by the petitioner Bernich relating to gold recovered from a mine known as the Fern mine (Pet. 20–21; Br. 44).[10]

It is apparent from the record that the George Franklin Fuller, Sr., affidavits were introduced in support of the conspiracy charge (R. 244–248, 271–272, 528), which was not confined to any specific affidavits. While it is true that the presentation to the mint of certain described affidavits was alleged as overt acts in the conspiracy count, the Government, of course, was not limited in its proof of the conspiracy to those overt acts. It is also true that George Franklin Fuller, Sr., was not named as one

[10] These affidavits are contained in U. S. Exhibit 8.

of the defendants in the conspiracy count, but there was evidence that Fuller was a cripple, that the affidavits were taken by two of his sons, George John Fuller and Frank Ellwood Fuller, to various notaries public for the purpose of having the father's signature sworn to (R. 242–249, 253, 270–274, 336–339), and that these sons must have known that the affidavits were false (cf. R. 345–346). These two sons were named as defendants in the conspiracy count, and the affidavits were introduced apparently for the purpose of establishing that those defendants aided in the presentation to the mint of affidavits which swore that the gold to which they referred was recovered from a certain mine during a period when, according to the testimony, that mine was not being operated by anyone (R. 260–261, 299–300). These affidavits were, consequently, admissible in support of the charge in the conspiracy count that the defendants agreed to submit false affidavits to the mint and, under well-settled principles, could be considered not only against those who were instrumental in their presentation, but also against any of the other defendants named if found to be linked with them in the conspiracy charged.

For the same reason the Bernich affidavits were admissible under the conspiracy count. They were also admissible under the substantive counts. The affidavits upon which these counts were based stated that the petitioner Bernich had operated

the Fuller mine during three specific periods. The other affidavits introduced in evidence stated, however, that he had operated the Fern mine during two of these periods, and hence contradicted the indictment affidavits. The affidavits in controversy also corroborated testimony that petitioner Bernich had worked at the Fern mine during those two periods (R. 342–344).

(b) The petitioners also contend that prejudicial error resulted from the remark of the prosecutor at the time of the introduction of the first of the 200 George Franklin Fuller, Sr., affidavits that "it would be cumbersome to file an indictment containing 200 such affidavits" (Pet. 22; Br. 44). Clearly they are not in position to complain of this remark. The remark was evoked by the objection of defense counsel that only such affidavits were admissible as were specifically mentioned in the indictment (R. 247). As we have indicated, these affidavits were admissible under the conspiracy count. Since the affidavits in question were introduced in evidence, obviously no prejudice resulted from the mere statement of the prosecutor that there were some 200 of them in existence.

(c) Placing emphasis upon the 200 George Franklin Fuller, Sr., affidavits, the petitioners contend that error was committed in refusing to grant their demand for a bill of particulars (Pet. 19–20; Br. 43). So far as the conspiracy count is concerned, the Government was not, of course, re-

quired to disclose all of its evidence. Moreover, it enumerated as overt acts the presentation to the mint of the six affidavits in which the petitioners were directly interested. The disclosure of the affidavits in question was primarly a matter which, as we have indicated, concerned the defendants George and Frank Fuller, who are not petitioners here. Under the circumstances, the petitioners, we submit, have not made a sufficient showing of abuse of discretion in refusing a bill of particulars. In any event, each of the substantive counts specifically sets forth the affidavit upon which it was based. It is evident, therefore, that even if a bill of particulars should have been granted as to the conspiracy count, reversible error did not result since the concurrent sentences on the substantive counts exceeded that on the conspiracy count.

IV

The petitioners further contend that their motions for an instructed verdict should have been granted because there was no evidence to establish the falsity of the affidavits set forth in the indictment. However, it would seem readily apparent from the summary of the evidence set forth in the Statement (*supra,* pp. 4–7), that there was ample testimony establishing that the petitioners were employed elsewhere during the periods when, according to the affidavits, they were recovering gold from the Fuller mine. Indeed, there was evidence indi-

cating that that mine was not in operation at all during a portion of the pertinent periods. There was, consequently, sufficient evidence to justify the submission to the jury of the question whether the petitioners had sworn falsely in their affidavits that they had themselves recovered the gold in question from the Fuller mine during the periods alleged. The Circuit Court of Appeals in its opinion stated that the evidence was sufficient to warrant the conviction of both petitioners (R. 564). The evidence establishing the guilt of the petitioners was deemed sufficient by the jury and by both courts below, and the petitioners have made no convincing showing to the contrary. There is, therefore, no occasion for this Court to re-examine the evidence. Cf. *Delancy* v. *United States,* 263 U. S. 586, 589–590.

Petitioners complain of the statement of the Circuit Court of Appeals, in holding that the evidence was sufficient to sustain their conviction, that the petitioners "did not take the stand and no evidence was introduced in their defense" (R. 565), citing in this connection the statute precluding any inference of guilt from the failure of a defendant to testify (Act of March 16, 1878, c. 37, 20 Stat. 30, Appendix, *infra,* p. 22). It is clear, however, from the language of this statute that it applies only to trials in the District Court.

CONCLUSION

The petition presents no question requiring review by this Court, and we therefore respectfully submit that it should be denied.

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AUGUST 1940.

APPENDIX

The false claims statute (Criminal Code, Sec. 35, as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996 (U. S. C., Title 18, Sec. 80)), so far as pertinent, provides:

> * * * or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The Gold Reserve Act of January 30, 1934, c. 6, 48 Stat. 337, provides in part:

> SEC. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) for such other purposes as in his judgment are not inconsistent with the pur-

poses of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in the Philippine Islands or other places beyond the limits of the continental United States. [U. S. C., Title 31, Sec. 442.]

SEC. 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred. [U. S. C., Title 31, Sec. 443.]

SEC. 8. Section 3700 of the Revised Statutes (U. S. C., Title 31, sec. 734) is amended to read as follows:

"SEC. 3700. With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts, at home or abroad, with any direct obligations, coin, or currency of the United States, authorized by law, or with any funds in the Treasury

not otherwise appropriated, at such rates and upon such terms and conditions as he may deem most advantageous to the public interest; any provision of law relating to the maintenance of parity, or limiting the purposes for which any of such obligations, coin, or currency, may be issued, or requiring any such obligations to be offered as a popular loan or on a competitive basis, or to be offered or issued at not less than par, to the contrary notwithstanding. All gold so purchased shall be included as an asset of the general fund of the Treasury."

SEC. 11. The Secretary of the Treasury is hereby authorized to issue, with the approval of the President, such rules and regulations as the Secretary may deem necessary or proper to carry out the purposes of this Act. [U. S. C., Title 31, Sec. 822b.]

The Provisional Regulations issued under the Gold Reserve Act by the Secretary of the Treasury and approved by the President January 31, 1934, provide, in part, as follows:

SEC. 2. Art. I. *Scope.*—Articles 2, 3, 4, and 5 of these regulations refer particularly to section 3 of the act; and articles 6 and 7 refer particularly to sections 8 and 9, respectively, thereof.

* * * * *

SEC. 5, Art. I. *General provisions affecting applications, affidavits, and reports.*—Every application, affidavit, and report required to be made hereunder shall be made upon the appropriate form prescribed by the Secretary of the Treasury * * *.

SEC. 35, Art. VI (entitled "Purchase of Gold by Mints"). The mints, subject to the conditions specified in these regulations, and

the general regulations governing the mints, are authorized to purchase:

(a) Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof, and which shall not have entered into monetary or industrial use;

* * * * *

SEC. 38, Art. VI. *Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof.*— (1) The mints shall not purchase any gold under clause (a) of section 35 unless the deposit of such gold is accompanied by a properly executed affidavit as follows:

"An affidavit on form TG–19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the United States or any place subject to the jurisdiction thereof:"

* * * * *

Judicial Code, Section 42 (U. S. C., Title 28, Sec. 103), provides:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

Judicial Code, Section 53 (U. S. C., Title 28, Sec. 114), provides, in part:

> * * * All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defend-

ant, shall order the cause to be transferred for prosecution to another division of the district.

The Act of March 16, 1878, c. 37, 20 Stat. 30 (U. S. C., Title 28, Sec. 632), provides:

> In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

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